20190074
FILED
IN THE OFFICE OF THE
CLERK OF SUPREME COURT
JUNE 3, 2019
STATE OF NORTH DAKOTA

IN THE SUPREME COURT OF NORTH DAKOTA

In the Interest of K.V., a child

	)	**Supreme Court File No.**
State of North Dakota,	)	**20190074**
	)	
Petitioner and Appellee,	)	**Ramsey County No.**
	)	**36-2018-JV-00072**
v.	)	
	)	
A.V., mother of said child,	)	**APPELLANT'S BRIEF**
E.D, father of said child, and	)	
K.V., said child,	)	
	)	
Respondents and Appellant.	)	

Appeal from the findings of fact and order for disposition entered February 14, 2019 in Ramsey County District Court, Northeast judicial district, North Dakota the Honorable Lonnie Olson, presiding.

APPELLANT'S BRIEF

ORAL ARGUMENT REQUESTED

Kiara C. Kraus-Parr
ND Bar No. 06688
Kraus-Parr, Morrow, & Weber
424 Demers Ave
Grand Forks, ND 58201
Office: (701) 772-8991
service@kpmwlaw.com
Attorney for the Respondent – Appellant

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TABLE OF AUTHORITIES

Cases

Statutes, Rules, Codes

Oral Argument:

Oral argument has been requested to emphasize and clarify the Petitioner's written arguments on their merits.

Transcript References:

The adjudication hearing was held on February 14, 2019. The transcript of that proceeding is referred to as Tr. in this brief.

JURISDICTION

[¶ 1] Appeals shall be allowed from decisions of lower courts to the Supreme Court as may be provided by law. Pursuant to constitutional provision article VI § 6, the North Dakota legislature enacted Sections 29-28-03 and 29-28-06, N.D.C.C., which provides as follows:

"An appeal to the Supreme Court provided for in this chapter may be taken as a matter of right. N.D.C.C. § 29-28-03. An appeal may be taken by the defendant from:

1. A verdict of guilty;
2. A final judgment of conviction;
3. An order refusing a motion in arrest of judgment;
4. An order denying a motion for new trial; or
5. An order made after judgment affecting any substantial right of the party."

N.D.C.C. § 29-28-06.

[¶ 2] N.D.C.C. § 27-20-56 specifically provides that a party may appeal from a final order, judgment, or decree of the juvenile court.

STATEMENT OF THE ISSUES

[¶ 3] I. Whether N.D.C.C. § 12.1-22-3(3)(b) is void for vagueness.

II. Whether there was insufficient evidence that K.V. was a delinquent child.

a. Whether there was insufficient evidence that K.V. committed criminal trespass.

b. Whether there was insufficient evidence that K.V. fled or attempted to elude a peace officer.

c. Whether there was insufficient evidence that K.V. drove recklessly.

STATEMENT OF CASE

[¶ 4] This is an appeal from the Ramsey county juvenile Corrected Findings of Fact and Order for Disposition, dated March 7, 2019 (Appendix #19). On, November 15 2018 in case number 36-2018-JV-00072, a juvenile petition was filed alleging K.V. was a delinquent child. The petition contained three allegations; 1.) K.V. committed criminal trespass, in violation of N.D.C.C. § 12.1-22-03(3)(b), a class A misdemeanor, 2.) K.V. fled or attempted to elude a peace officer, in violation of N.D.C.C. § 39-10-71(1), a class A misdemeanor, and 3.) K.V. committed reckless driving, in violation of N.D.C.C. § 39-08-03(2), a class B misdemeanor.

[¶5] An adjudication hearing on the petition was held on February 14, 2019. The court found beyond a reasonable doubt that K.V. committed all three of the allegations in the petition and concluded based on a preponderance of the evidence that K.V. was a delinquent child pursuant to N.D.C.C. § 27-20-02(7). K.V. timely appealed from the court's finding of fact and disposition.

STATEMENT OF FACTS

[¶ 6] On June 16, 2018, Officer Myrum received a call regarding a trespass that occurred at the Butler Machinery lot on June 13, 2018. Tr. pp. 15 -17, 35. Officer Myrum testified that there were two "large 'no trespassing' signs by the entrance of the lot." Tr. p. 17 ln. 3-4. Officer Myrum followed up

with T.P., Mr. Park a pseudonym. Tr. p. 16. Mr. Park indicated he drove through the lot, but did not notice any "no trespassing" signs. Tr. p. 17. Mr. Park stated that K.V. was following behind him through the lot in a red pickup truck. Tr. pp. 24-25.

[¶ 7] On August 15, 2018, Officer Halima Khalifa of the narcotics task force testified that she saw K.V. enter an older red Chevy pickup and drive a little past Pop's Bar. Tr. pp. 43-44. Officer Khalifa stated that K.V.'s truck had a tail light out and that he failed to make a complete stop at a stop sign. Tr. p. 44. Officer Khalifa relayed her information to Officer Johnson of the Devils Lake police department.

[¶ 8] Officer Johnson turned around on Sixth Avenue and saw the red pickup. Tr. p. 49. Officer Johnson saw the vehicle go through three stops signs without stopping. *Id.* He was roughly a block away from the truck when he activated his overhead lights. *Id.* Officer Johnson estimated the truck's speed at 60 to 65 miles per hour. Tr. p. 50. Officer Johnson testified that he came around the corner of Fifth Avenue, crossed Sixth, then shut off his lights, and did not continue the pursuit. *Id.* Officer Johnson did not see who was driving the truck when he was pursuing it. Tr. pp. 50-51.

[¶ 9] Barry Johansen was the owner of the red truck at the time of this incident. Tr. p. 59. Mr. Johansen testified that Charles Shapiro was in possession of the truck and the keys to the truck during the alleged fleeing.

Tr. pp. 59-60. Mr. Johansen testified that Mr. Shapiro looks similar to K.V. and has been mistaken as K.V. in the past. Tr. p. 59.

LAW AND ARGUMENT

I. Whether N.D.C.C. § 12.1-22-3(3)(b) is void for vagueness.

Standard of Review

[¶ 10] Whether a statute is unconstitutional is a question of law, which is fully reviewable on appeal. *State v. Holbach,* 2009 ND 37, ¶ 23, 763 N.W.2d 761; *Teigen v. State,* 2008 ND 88, ¶ 7, 749 N.W.2d 505. All regularly enacted statutes carry a strong presumption of constitutionality, the party challenging the statute must clearly demonstrate that it violates the state or federal constitution. *Teigen,* at ¶ 7; *Grand Forks Prof'l Baseball, Inc. v. North Dakota Workers Comp. Bureau,* 2002 ND 204, ¶ 17, 654 N.W.2d 426. Any doubt about a statute's constitutionality must, when possible, be resolved in favor of its validity. *State v. M.B.,* 2010 ND 57, ¶ 4, 780 N.W.2d 663; *Hoffner v. Johnson,* 2003 ND 79, ¶ 8, 660 N.W.2d 909.

[¶ 11] U.S. Const. amend. V. If a criminal law is too vague for a person of common intelligence to understand, they must guess as to the law's application, what conduct is prohibited, or what punishment may be imposed. Vague laws also facilitate arbitrary and discriminatory enforcement. This upsets a person's due process because vague laws "violate the two essential values of fair warning and nondiscriminatory enforcement." *State v. Tibor*, 373 N.W.2d 877, 880 (N.D. 1985). The United States Supreme

Court in *Papachristou* found the City of Jacksonville ordinance for vagrancy was facially unconstitutional because, "it 'fails to give a person of ordinary intelligence fair notice that his contemplated conduct is forbidden by the statute,'…it encourages arbitrary and erratic arrests and convictions… makes criminal activities which by modern standards are normally innocent… [and because of] the unfettered discretion it places in the hands of the Jacksonville police." *Papachristou v. City of Jacksonville*, 405 U.S. 156, 161-171 (1972) quoting *United States v. Harriss*, 347 U.S. 612, 617, (1954).

[¶ 12] When interpreting a rule, the Court applies principles of statutory construction to determine its intent: First, looking at the language of the rule and giving words their plain, ordinary, and commonly understood meaning. Additionally, the statutes are read to harmonize related provisions to give meaning to each provision if possible. *Desert Partners IV, L.P. v. Benson*, 2014 ND 192, ¶ 9, 855 N.W.2d 608; *State v. Lamb*, 541 N.W.2d 457, 461(N.D. 1996). An ambiguous statute or rule is one that is prone to differing but rational meanings. *State v. Rue*, 2001 ND 92, ¶ 33, 626N.W.2d 681. The official explanatory note for a rule has been relied upon to construe a rule. *Lamb*, at 461.

[¶ 13] K.V. was found guilty of criminal trespass pursuant to N.D.C.C. § 12.1-22-3(3)(b) which reads:

> Even if the conduct of the owner, tenant, or individual authorized by the owner varies from the provisions of subdivision a, an individual may be found guilty of violating subdivision a if the owner, tenant, or individual authorized by the owner substantially complied with

> subdivision a and notice against trespass is clear from the circumstances.

Based upon the statute the owner must substantially comply with N.D.C.C. § 12.1-22-3(3)(a), which reads:

> An individual is guilty of a class B misdemeanor if, knowing that that individual is not licensed or privileged to do so, the individual enters or remains in any place as to which notice against trespass is given by actual communication to the actor by the individual in charge of the premises or other authorized individual or by posting in a manner reasonably likely to come to the attention of intruders. The name of the person posting the premises must appear on each sign in legible characters.

However, the ambiguity of the statute becomes evident when one looks at N.D.C.C. § 12.1-22-3(4)(a) which reads:

> An individual, knowing the individual is not licensed or privileged to do so, may not enter or remain in a place as to which notice against trespass is given by posting in a manner reasonably likely to come to the attention of intruders. A violation of this subdivision is a noncriminal offense.

Section (4)(a), which is a noncriminal offense, reads exactly the same for trespass posting as section (3)(a) which is a criminal offense. The only difference is that section (3)(a) requires "The name of the person posting the premises must appear on each sign in legible characters." Section (3)(b) indicates that owners need only to substantially comply with the posting requirement. These statutes, when read together, are ambiguous as to what actions are criminal and what are noncriminal.

[¶ 14] Because of the ambiguous nature of the statute the same activity could be considered criminal or noncriminal. Just as the Court found

in *Papachristou* this statute is facially unconstitutional because, "it 'fails to give a person of ordinary intelligence fair notice that his contemplated conduct is forbidden by the statute,'…it encourages arbitrary and erratic arrests and convictions… makes criminal activities which by modern standards are normally innocent… [and because of] the unfettered discretion it places in the hands of the…police." K.V. cannot be found in violation of an unconstitutional statute.

II. Whether there was insufficient evidence that K.V. was a delinquent child.

[¶ 15] A party may appeal from a final order, judgment, or decree of the juvenile court pursuant to N.D.C.C. § 27-20-56. This Court reviews a juvenile court's findings of fact under the clearly erroneous standard. *In re H.K.*, 2010 ND 27, ¶ 19, 778 N.W.2d 764 (*relying on In re J.K.*, 2009 ND 46, ¶ 13, 763 N.W.2d 507, explaining change from trial de novo based on changes in N.D.R.Civ.P. 52(a)). The interpretation of a statute is a question of law, which is fully reviewable on appeal. *In re R.A.*, 2011 ND 119, ¶ 24, 799 N.W.2d332 (citation omitted).

a. Whether there was insufficient evidence that K.V. committed criminal trespass.

[¶ 16] The only possible way to read N.D.C.C. § 12.1-22-3(3)(a), N.D.C.C. § 12.1-22-3(3)(b), and N.D.C.C. § 12.1-22-3(4)(a) so that they may be applied in a constitutional way, is to determine substantial compliance requires, "The name of the person posting the premises must appear on each

sign in legible characters." N.D.C.C. § 12.1-22-3(3)(a). That requirement is the only difference between a criminal and a noncriminal trespass and therefore it must be present for a criminal charge of trespass.

[¶ 17] There was no testimony as to if either sign had the name of the person posting the premises in legible characters. Without that information this cannot be a criminal trespass. Therefore, the court lacked sufficient evidence to find K.V. guilty beyond a reasonable doubt of criminal trespass.

b. Whether there was insufficient evidence that K.V. fled or attempted to elude a peace officer.

[¶ 18] Officer Johnson did not see who was driving the truck when he was pursuing it. Tr. pp. 50-51. He was roughly a block away from K.V. when he activated his overhead lights. He came around the corner of Fifth Avenue, crossed Sixth, then shut off his lights, and did not continue the pursuit. *Id.*

[¶ 19] N.D.C.C. § 39-10-71 reads:

1. Any driver of a motor vehicle who willfully fails or refuses to bring the vehicle to a stop, or who otherwise flees or attempts to elude, in any manner, a pursuing police vehicle or peace officer, when given a visual or audible signal to bring the vehicle to a stop, is guilty of a class A misdemeanor for a first offense…
2. A signal complies with this section if the signal is perceptible to the driver and:
   a. If given from a vehicle, the signal is given by hand, voice, emergency light, or siren, and the stopping vehicle is appropriately marked showing it to be an official police vehicle

[¶ 20] Based upon the testimony presented the driver of the truck was always at least a block or more away and sometimes around the corner from the officer after he put on his overhead lights. There was no testimony that

indicated the driver knew the officer was attempting to pull him over. The officer testified that the area was busy that evening and it is reasonable to believe the officer could be on a call or attempting to pull over one of the other vehicles in the area. At no time was the officer closer than a block away from the red truck. Additionally, the officer stated he did not see who was driving the red truck, probably because he was so far behind the vehicle. Therefore, there was not sufficient evidence to show that the driver was K.V. or that the driver knew the officer was attempting to pull him over.

c. Whether there was insufficient evidence that K.V. drove recklessly.

[¶ 21] Officer Johnson testified that he saw the red truck go through three stops signs without stopping. *Id.* The officer was roughly a block away from the truck. *Id.* Officer Johnson visually estimated the truck's speed at 60 to 65 miles per hour from a block away. Tr. p. 50. N.D.C.C. § 39-08-03 reads:

> Any person is guilty of reckless driving if the person drives a vehicle:
>
> 2. Without due caution and circumspection and at a speed or in a manner so as to endanger or be likely to endanger any person or the property of another.

Subsection two (2) of reckless driving deals specifically with speed, subsection one (1) deals specifically with a general disregard for the safety of others. K.V. was charged under subsection (2) indicating that the rate of speed the truck was traveling was the essential component of the reckless driving charge. However, there was no evidence presented that met a beyond a reasonable doubt standard as to the rate of speed the truck was traveling.

[¶ 22] Police visual speed estimations may provide probable cause, with enough information. However no court has found that an estimation has enough reliability to show a specific speed beyond a reasonable doubt. In *United States v. Sowards,* the majority concluded that the deputy's "visual speed estimate was in fact a guess that was merely conclusory, without an appropriate factual foundation, and simply lacking in the necessary *indicia* of reliability to be an objectively reasonable basis for probable cause to initiate a traffic stop." *United States v. Sowards,* 690 F.3d 583, 594 (4th Cir. 2012). The *Sowards* Court concluded that for a visual speed estimate to supply probable cause, "there must be sufficient *indicia* of reliability for a court to credit as reasonable an officer's visual estimate of speed." *Id.* at 591.

[¶ 23] In *United States v. Gaffney*, the Eighth Circuit Court relied on *Sowards* conclusion that for a visual speed estimate to supply probable cause, there must be sufficient *indicia* of reliability for a court to credit as reasonable an officer's visual estimate of speed. *United States v. Gaffney*,789 F.3d 866, 869 (8th Cir. 2015) (citations omitted). In the case before the juvenile court there were no other indicia of reliability to even support a finding of probable case that the truck was traveling at 60 to 65 miles per hour. The Officer did not testify to his specific training on visual estimations. He did not testify regarding his experience or his success rate at visual speed estimation. There was not a second officer who verified the speed estimation. There was no testimony at all as to how the officer came to the conclusion the

truck was traveling at 60 to 65 miles an hour. By all standards contemplated in *Gaffney* there is not enough information to determine how fast the truck was traveling for a probable cause determination let alone beyond a reasonable doubt.

[¶ 24] The court relied on the speed of the truck and the driver not stopping for three stop signs to support a finding of reckless driving. The finding of reckless driving cannot be solely for the stop signs, because there was testimony that the truck did not stop at sign prior to this. That did not instigate a traffic stop. Additionally, the court found that the speed, specifically, in a residential area was reckless. However, without a proper speed there was not sufficient evidence to support the allegation of reckless driving.

[¶ 25] There was not sufficient evidence to show that K.V. was driving the truck when Officer Johnson was following it. The officer specifically testified that he did not see who was driving the truck when he was pursuing it. Tr. pp. 50-51. Therefore, there was insufficient evidence that K.V. drove recklessly.

CONCLUSION

[¶ 26] Because the criminal trespass statute is unconstitutionally vague and because there was insufficient evidence that K.V. committed criminal trespass, fled from the police, or drove reckless he is not a delinquent child in need of rehabilitation.

[¶ 27] WHEREFORE, K.V. respectfully requests this Court reverse the Findings of Fact and Disposition of the juvenile court and find that the criminal trespass statute is unconstitutionally vague. K.V. also prays this Court finds there was not sufficient evidence to support the allegations in the State's petition.

Dated this 3th day of June, 2019

/s/ Kiara C. Kraus-Parr
ND Bar No. 06688
Kraus-Parr, Morrow, & Weber
424 Demers Ave
Grand Forks, ND 58201
Office: (701) 772-8991
service@kpmwlaw.com
Attorney for the Respondent – Appellant

IN THE SUPREME COURT OF NORTH DAKOTA

In the Interest of K.V., a child

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State of North Dakota,	)	**20190074**
	)	
Petitioner and Appellee,	)	**Ramsey County No.**
	)	**36-2018-JV-00072**
v.	)	
	)	
A.V., mother of said child,	)	**CERTIFICATE OF**
E.D, father of said child, and	)	**COMPLIANCE**
K.V., said child,	)	
	)	
Respondents and Appellant.	)	

[¶ 1] This Appellant's Brief and Appendix complies with the page limit of 38 set forth in Rule 32(a)(8)(A) of the North Dakota Rules of Appellate Procedure as it only has 16 pages.

Dated this 3th day of June, 2019

/s/ Kiara C. Kraus-Parr
ND Bar No. 06688
Kraus-Parr, Morrow, & Weber
424 Demers Ave
Grand Forks, ND 58201
Office: (701) 772-8991
service@kpmwlaw.com
Attorney for the Respondent – Appellant

IN THE SUPREME COURT OF NORTH DAKOTA

In the Interest of K.V., minor child Defendant, State of North Dakota, Petitioner, v. E.D., father, Respondent, and A.V., mother, Respondent.	)))))))))))))))	**Ramsey County Case No. 36-2018-JV-00072** **Supreme Court Case No. 20190074** **Certificate of Service**

[¶1] The undersigned, being of legal age, being first duly sworn deposes and says that she served true copies of the following documents:

Appellant's Brief
Appellant's Appendix

[¶2] And that said copies were served upon:

Maren Halbach, Assistant State's Attorney, ramseysa@nd.gov

by electronically filing said documents through the court's electronic filing system.

Dated: June 3, 2019.

/s/ Kiara Kraus-Parr
Kiara Kraus-Parr (ND#06688)
Kraus-Parr, Morrow, & Weber
424 Demers Avenue
Grand Forks, ND 58201
P: (701) 772-8991
F: (701) 795-1769
service@kpmwlaw.com
Attorney for Appellant

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IN THE SUPREME COURT OF NORTH DAKOTA

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Appellant's Brief
Appellant's Appendix

[¶2] And that said copies were served upon:

Maren Halbach, Assistant State's Attorney, ramseysa@nd.gov

by electronically filing said documents through the court's electronic filing system.

Dated: June 10, 2019.

/s/ Kiara Kraus-Parr
Kiara Kraus-Parr (ND#06688)
Kraus-Parr, Morrow, & Weber
424 Demers Avenue
Grand Forks, ND 58201
P: (701) 772-8991
F: (701) 795-1769
service@kpmwlaw.com
Attorney for Appellant

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Petitioner and Appellee,	)	**Ramsey County No. 36-2018-JV-00072**
v.	)	
A.V., mother of said child, E.D, father of said child, and K.V., said child,	)	**CERTIFICATE OF SERVICE**
Respondents and Appellant.	)	

[¶1] The undersigned, being of legal age, being first duly sworn deposes and says that she served true copies of the following documents:

Appellant's Brief
Appellant's Appendix

[¶2] And that said copies were served upon:

K.V., 1107 10 Ave SE, Devils Lake, ND 58301

by placing a true and correct copy of said documents with USPS, certified mail.

Dated: June 10, 2019.

/s/ Kiara Kraus-Parr
Kiara Kraus-Parr (ND#06688)
Kraus-Parr, Morrow, & Weber
424 Demers Avenue
Grand Forks, ND 58201
P: (701) 772-8991
F: (701) 795-1769
service@kpmwlaw.com
Attorney for Appellant